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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

No. 75-710

BOLT, BERANEK AND NEWMAN, INC.,
Petitioner,

v.

McDONNELL DOUGLAS CORPORATION,
Respondent.

BRIEF OF RESPONDENT

In Opposition to Petition for a Writ of Certiorari

FREDERICK M. WOODRUFF
GRAVELY, LIEDER & WOODRUFF
705 Olive Street
St. Louis, Missouri 63101
A/C 314-621-1457
Attorneys for Respondent

Of Counsel
WALTER J. JASON
GEORGE W. FINCH
McDonnell Douglas Corporation
3855 Lakewood Boulevard
Long Beach, California 90846
A/C 213-593-6834

St. Louis Law Printing Co., Inc., 812 Olive Street 63101 314-231-4477

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FOREWORD

The question Petitioner presents to this court needs to be stripped of its subjective verbiage[1] before the real question can be found and understood. Once this is done, there is nothing left but an absolutely run-of-the-mill patent validity question wherein Petitioner objects to the conclusion of the Court of Appeals that, using the standards of *Graham v. John Deere*, 383 U.S. 1, at 17, the structure of claim 13 of the

[1] Examples: P2—"what is now conceded to be an attitude of hostility";—"bold contravention,"—"Free and easy,"—"deliberately and openly refusing,".

NOTE: Reference to pages in the Petition for Writ of Certiorari will be P. followed by the page number.

patent in issue is obvious. To give weight to this flimsy basis for its petition,

a) Petitioner makes numerous misstatements, both about the testimony at the trial and about what Watters patent discloses—the same misstatements were all made to the Court of Appeals, but the careful analysis of that Court prevented them from having their intended effect to mislead,

b) Petitioner uses—and misuses—statistics, with no concern for the individual situations behind the statistics,

c) Petitioner uses misleading out-of-context statements of opinion culled from various sources about the Eighth Circuit's position on patents, and

d) Petitioner makes a surprisingly vitriolic attack[2] on not only the competence, but also the integrity of the Eighth Circuit Court of Appeals, basing its attack on the totally unsupported allegation that the Court had refrained from applying the test of obviousness of *Graham v. John Deere*, supra.

Petitioner has presented nothing more than carefully cultivated indignation, which tactic obviously cannot change the question presented to this Court from a conventional patent case (thoughtfully considered and determined at both the Trial and Appellate level in accordance with the guidelines of this Court) to something of broad new significance.

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[2] P 12: ". . . the Court of Appeals . . . has boldly become the new adversary . . .".

P 14: ". . . campaign of patent destruction to which the Court of Appeals for the Eighth Circuit has committed itself . . .".

P 19 and 20: "The Supreme Court's supervisory authority should be promptly exercised . . . to avoid a stigma for the Courts of the kind to which the Executive Branch has recently been subjected.".

THE QUESTION REALLY PRESENTED

Rather than the question presented by Petitioner (P 2, 3), Respondent submits that the following is the question which is really presented:

Do the concurrent findings of patent invalidity by the Court of Appeals for the Eighth Circuit and the District Court (after a full trial), based on pertinent prior art not considered by the Patent Office, present any issues (constitutional or otherwise) of such magnitude that the Appellate decision should be reviewed by the Supreme Court in order to establish a judicial precedent for lower Federal District and Appellate Courts?

CORRECTED STATEMENT OF THE CASE

Petitioner's statement is incomplete and inaccurate. The evidence presented at the trial established that the Watters Patent (which was obtained by using a false affidavit in the Patent Office)[3] merely combined well known acoustical principles to reach an obvious result. The District Court held the Watters Patent invalid under 35 USC 103 on the basis of obviousness and, further found the patent not infringed. The Circuit Court unanimously affirmed its District Court's finding of invalidity, and stated there was no need to rule on the question of infringement.

A. Petitioner's Patent Has Nothing to Do With Jet Engines

Contrary to Petitioner's allegation that this case is concerned with a "startling advance in silencing jet engine noise" the facts show that the Watters Patent had nothing to do with

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[3] See the Circuit Court decision, footnote 2, P 27.

the quieting of a jet aircraft or of jet engines. (App. Vol. VI, pp. E588-589).

The facts establish that the subject-matter of the Watters Patent was evolved in an attempt to arrive at a sound-absorbing structure suitable for use in air-conditioning ducts (App. Vol. I, p. 109). The facts show that Watters never put any of his panels inside of a jet engine (App. Vol. I, p. 173), and in fact, the evidence presented showed that no tests in moving air were made—Watters only tested in a closed-end duct with static air and testing equipment precisely as taught by the prior art. (App. Vol. 6 E 603-607)

Most important of all to this petition, Watters *never* built or tested the structure of claim 13[4] (shown in Fig. 6 of Watters Patent)—to this day, claim 13 is a "paper patent", unbuilt, untested, and unwanted.

The facts show that no structure disclosed by Watters Patent had any commercial success in *any* field. It was never placed into any use by Petitioner itself and Petitioner was unable to license it, even in applications with slow moving air as found in air-conditioning ducts. (App. Vol. I, p. 165)

B—Claim 13 Does Not Cover Respondent's Structure.

Petitioner has abandoned all of the contested claims in the patent but claim 13, thereby conceding the correctness of the

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[4] App. Vol. VI, pp. E 597, 611 (Watters Deposition)

Q. Do you recall whether Fig. 6 represents an experimental installation for test purposes?

A. No, I do not recall that, sir. I do not recall a test that resembles Fig. 6.

* * * * * * * *

"Q. Do you recall making a physical sample showing the structure of Fig. 5 of Exhibit 1?

A. No, I do not recall that.

Q. How about the Fig. 6 configuration?

A. I don't recall testing that configuration."

Circuit Court's judgment of invalidity as to these claims. In footnote 9, P 12, Petitioner makes the statement "Even a surface comparison of App. A with P. Ex. 21A shows the clear infringement of claim 13." This is untrue. Claim 13 is dependent on abandoned claim 1 and thus necessarily includes all of the limitations of claim 1. Claim 1 calls for a "thin limp relatively flexible porous sheet" and thus claim 13 must also include this limitation. The District Court found that McDonnell Douglas Corporation's jet engine acoustical duct structure did not infringe claim 1 because the structure did not have this limp sheet. Since claim 13 too requires a limp sheet, the District Court's finding of noninfringement applies also to that claim. Contrary to Petitioner's statement on P 12 (footnote 9) that the "GE absorbers . . . were *not* among those held by the District Court not to be infringements", the District Court stated that "None of the accused mechanisms have such a 'limp' sheet." (P 50).

C—The Circuit Court Conscientiously Followed the Guidelines of This Court Set Forth in Graham v. John Deere.

The Petitioner recklessly accuses the Circuit Court of Appeals of not having complied with the obviousness test of *Graham v. John Deere Co.* (1966), 383 U.S. 1.

A reading of the Court of Appeals decision (P 23-35) strips the Petitioner's arguments of any validity and clearly establishes that the Court did conscientiously test the alleged invention of the Watters Patent against the standard enunciated by this Court in *Graham v. John Deere*, supra, and properly found the patent invalid. Against the background of the standard of *Graham v. John Deere*, and specifically quoting the standard, the Court reviewed the District Court's factual findings as to the scope of the prior art and its comparison of the art with the Watters Patent and then made a judgment that there was no clear error in such findings and that the District Court's "legal conclusion

of obviousness was proper in the light of those findings" (P. 27, 28).

It is interesting to note this statement of the Circuit Court: "Indeed, we find support for the conclusion of invalidity, not only in the items of prior art enumerated by the Court, but also in various other publications and patents which were introduced at trial". (P. 28) It is evident from this statement and the discussion that follows that the Circuit Court had not contented itself with merely a perfunctory review of the District Court's holdings but that it had made its own in depth study.

The painstaking care taken by the Circuit Court to fairly and properly judge the validity of the Watters Patent is apparent from a reading of its decision. Beginning at P. 29, having analyzed the Watters Patent and determined the techniques or features which made up the alleged invention of Watters, the Court then proceeded to consider each technique or feature, both separately and in its relationship to the other features, and then specifically identified the prior art disclosing such features, including some prior art which disclosed *all* the features of claims 1, 2, 11 and 16, and in the same relationship. It thereafter took each of the allegedly infringed claims of the Watters Patent and showed wherein each was obvious in view of the teachings of the prior art.

In connection with claim 13, it must be kept in mind, as noted above, that it is dependent on claim 1, i.e., it includes everything in claim 1, and adds to the claim 1 amalgam only its own specific single feature. The question, thus, is really whether the single additional feature of claim 13 was unobvious over the prior art which Petitioner has now conceded to have invalidated claim 1. With this in mind, it is clear that the Circuit Court, contrary to the accusations of the Petitioner, did apply the test of *Graham v. John Deere*, 383 U.S. 1, to claim 13. At P33 and 34, the Court described the alleged inventive

feature of claim 13 and then specifically identified several items of prior art (also utilized in invalidating claim 1) which rendered this single additional feature obvious. Petitioner understandably ignored, but the Circuit Court noted, the concession made by Watters right in his patent that the addition made by claim 13 *was a routine exercise*. The Court stated (P 33, 34): "The Watters Patent application implicitly recognized the obviousness of the latter approach:

> If it is desired to introduce particular frequency resonance phenomen, *of course*, the acoustically opague [sic] supporting members * * * may, in some areas, be rendered substantially transparent. * * * (Emphasis supplied)"

As to the level of skill in the pertinent art, the Circuit Court gave thoughtful consideration to the uncontradicted evidence before the Trial Court (P 28, footnote3): "The uncontradicted testimony of one of defendant's experts, brought out in cross-examination, was that

> "* * * [i]n this particular art it has been demonstrated at the trial that the level of skill is quite a high level. It is a level of persons who have degrees and occasionally graduate degrees in engineering and usually related to this type of engineering. * * *"

Respondent submits that the Circuit Court clearly understood the standard test for obviousness set forth in *Graham v. John Deere*, supra; did follow the test in every respect and properly did come to the only possible conclusion: that the alleged invention of the Watters Patent was obvious and invalid in view of the teachings of the prior art brought to the attention of the District Court and the Circuit Court.

D—Petitioner Has Twisted the Evidence in the Case, Particularly With Respect to "Surprise."

Petitioner seeks to hide the obviousness of Watters' alleged invention by grossly twisting the testimony of the various witnesses (P 8 et seq.). Petitioner repeatedly suggests that Respondent's witnesses were "surprised" by a phenomenon which Petitioner misleadingly states was present in the Watters Patent. The same tack was employed before the Circuit Court of Appeals, but without success since the facts plainly give the lie to Petitioner's contentions. As the Circuit Court perceptively sets forth in footnote 5, P 30, 31, "although the record shows that defendant's engineers expressed surprise at this phenomenon, it contradicts the plaintiff's assertion that Watters had discovered the phenomenon."

As the Circuit Court pointed out (P 29-31) Watters Patent states that his structure requires the use of either of two facings, one employing at least one layer of non-perforated tea-bag paper or cellulose film, and the other, a single sheet facing having very tiny openings (Petitioner's own witness, Dr. Beranek, described the holes "The needlepoint holes are very tiny—" (App. Vol. I, P 106, 107). The second facing admittedly was taken from an earlier Watters and Baruch Patent 2,935,151. Watters even warned (in this earlier patent) that bigger holes would not work, and stated, as an example, that 1/16 inch holes were too large to be operative.

Petitioner, however, proceeds to totally ignore the evidence that shows that the structures used by Respondent in its airplanes employ perforations much larger than the tiny needle-like holes required by the Watters structure. The evidence admittedly shows that the openings in Respondent's structure are 1/16 inch, the size which Watters specifically stated would not be operative.

The Circuit Court in its decision (footnote 5, P 30, 31) specifically calls attention to Watters' warning statement in his earlier patent

> "* * * If the openings are of the size ordinarily used in other types of sound absorbing ceilings * * *

such as openings on the order of 1/16 of an inch in diameter, more or less, relatively closely spaced from one another, then the resistance presented to the incident sound energy in the audible frequency range is too low to be effective to dissipate sound energy through the action of the perforations alone. * * *"[5]

The Circuit Court then summarized as follows: (footnote 5, P 31) *"Had defendants' engineers consulted the Watters Patent* and followed through on its reference to Watters and Baruch Patent '151, therefore, *they would have been led away from, rather than toward, their discovery* that holes 1/16 of an inch or larger became suddenly acoustically resistive in high velocity wind settings." (Emphasis added)

To illustrate what Watters really thought was his invention, Watters set forth three examples in his patent, none of which is directed to the concept of claim 13. Moreover only one example (Col. 3, lines 42-71, App. Vol. III, P E5) involving air-conditioning ducts describe the noise source to be controlled.

Watters thus not only *did not know* that Respondent's 1/16" holes could be used but, based on his own evidence (his earlier patent) *he had warned against that size*. Yet now, because Petitioner needs some eyecatcher with which to attack the Circuit

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[5] Notwithstanding this statement by Watters, Petitioner's misleading drawing on P 21 (an artist's concept, not found in the Watters Patent or in the evidence) shows many large perforations in the facing. This is what Watters said could *not* be operative. Fig. 6 of the Watters Patent, which illustrates claim 13, shows a sandwich facing with two sheets of tea-bag paper.

Court's finding of obviousness, it seizes on the fact that the results of high velocity wind tests on the GE structure "surprised" Respondent's engineers. Neither the District Court nor the Court of Appeals was deceived by this misleading approach.

E—Respondent Used Known Prior Art Non-Fibrous Techniques in Designing Its Structure.

Petitioner is guilty of gross misstatements (P 8, 9) when it states that defendant McDonnell Douglas, General Electric and NASA did not "look to the non-fibrous techniques" but "persisted in the fibrous techniques" without success. That Respondent, and others, did *not* persist in a futile effort is witnessed by the fact that Respondent and its engine supplier designed, through admittedly independent research efforts, a successful acoustical structure which does *not* involve fibrous techniques. Respondent's witness Smith, one of the principal designers of the structure used by Respondent, stated (on cross-examination) that when a commercial requirement arose in 1967 for fan engine noise suppression, the research effort on an acoustical panel began with prior knowledge of perforated plates in association with partitions (App. Vol. I, P 322-324). It took only from September '67 to early '68 to develop the finalized commercial panel design (App. Vol. I, P 355).

Petitioner thus misrepresents when it claims Respondent and GE "persisted" with fibrous techniques, and "desperately" tried to make them work in engines. Respondent and GE simply used the non-fibrous techniques which, as noted by the Circuit Court, had been around for thirty years (P 28, footnote 4). Petitioner also misrepresents the testimony of its own witness, Dr. Beranek; what he really said on the subject of engines at the trial was "I have never done any direct work on the quieting of noise from an engine itself in the case of jet engines" (App. Vol. I, P 77). Petitioner even misrepresents its own

patent's teachings in that Watters was both casual and permissive with respect to use of filler material in his patented structure (App. Vol. III, P E5, Col. 3, lines 24-26); if elimination of fibrous fillers was a marvelous new discovery, Watters obviously was not aware of it.

F—Significant New Prior Art Was Before the District Court and Circuit Court.

Petitioner seeks to paint a picture that the Circuit Court of Appeals for the Eighth Circuit had no prior art before it when it found all the claims of the Watters Patent (including claim 13) invalid, and that, in fact, the sole reason for the Court's holding was because of an illegal hostility to patents. The true fact is that the Circuit Court had an abundance of very pertinent, never previously cited, prior art before it which had been called to its attention by Respondent. Pages P 29 through P 34 are devoted to the Circuit Court's discussion of the prior art and to its reasoning in arriving at its judgment. In its treatment of claim 13 on P 33, the Circuit Court did make reference to three particularly significant pieces of art: "The Brillouin, Ingard and Bolt, and Ingard and Pridmore-Brown articles discussed this concept of 'tuning'." None of these was before the Patent Examiner.

G—Petitioner's False Affidavit Fraudulently Kept the Patent Office From Considering Good Prior Art.

The new prior art items cited by Respondent to the District Court and Circuit Court of Appeals were far more pertinent than any of the art cited by the Patent Office Examiner except possibly one, Goldstein Patent 2,870,857. However, as the Circuit Court of Appeals found (footnote 2, P 27), the Patent Office Examiner had been prevented from considering Goldstein be-

cause Watters had filed a false affidavit swearing that the Watters invention was earlier than Goldstein.[6] In this connection the Circuit Court said:

> "The record at trial, including the plaintiff's answers to interrogatories supports the conclusions that the affidavit was false and that Watters did not conceive of his device until after March 6, 1956. Although the record is ambiguous on the patent examiner's reason for ultimately allowing the patent, despite Goldstein, it supports the District Court's conclusion that the examiner relied on the false affidavit."

The District Court and the Circuit Court of Appeals, in arriving at their judgment that the Watters Patent was invalid, both gave extensive consideration to Goldstein, in addition to the prior art not reviewed by the Patent Examiner.

H—Respondent Did Meet the Statutory Burden on It of Establishing Invalidity of the Watters Patent.

Respondent not only proved to the Circuit Court and the District Court that a certain item of prior art (the Goldstein patent) cited by the Patent Office was of tremendous significance, but also proved that Petitioner had lied to the Patent Office by filing a false affidavit, in a successful effort to foreclose the Patent Examiner from using it (footnote 2, P 27). Respondent further cited numerous other pertinent prior art items which the Circuit and District Court found had not been considered by the Patent Office (P 26, 28). The failure of the

[6] It is noteworthy that the patentee, Watters, was present in the court room throughout the entire trial of this case in the District Court. Though Petitioner's attorney said in open court that Watters would testify (App. Vol. I, P 369), Watters did not do so, even though Respondent was accusing Petitioner of practicing fraud on the U. S. Patent Office by reason of Watters false affidavit.

Patent Office to consider the very pertinent art cited by Respondent, not to mention the false affidavit responsible for part of that failure, destroy the statutory presumption of validity attendant on issuance of a patent.

As the Ninth Circuit Court of Appeals noted in *Jaybee Mfg. Corp. v. Ajax Hardware Mfg. Corp.*, 287 F.2d 228, 229, 9th Cir. 1961: "However, even one prior art reference which has not been considered by the Patent Office may overthrow this presumption."

See also *Jacuzzi Bros. v. Berkeley Pump Co.*, 9th Cir., 1951, 191 F.2d 632, 634.[7]

The Circuit Court and the District Court both noted the pertinency of the art cited by Respondent and by their judgments in holding the Watters Patent invalid properly found that Respondent had met its burden of proof and had overcome the presumption of invalidity.

[7] Petitioner's quotations from *Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation*, 402 U. S. 313 (1971), seem calculated to mislead this Court as to the thrust of that case. *Blonder-Tongue*, 402 U. S. at 350, *vacated a judgment of patent validity* on the basis that a later alleged infringer has available to him a plea of estoppel if a patent has once been declared invalid. It changed nothing in the standards established in *Graham v. John Deere*, 383 U. S. 1. It is irrelevant to this case with the exception, in connection with Petitioner's false affidavit, of the quotation, at 402 U. S. 343, that ". . . the public [has] a paramount interest in seeing that patent monopolies spring from backgrounds free from fraud or other inequitable conduct. . . ."

ARGUMENT

Petitioner Has Misquoted the Statistics, But in Any Event the Statistics Here Support the Action of the Circuit Court.

Petitioner complains that the Eighth Circuit decisions have engendered a hostile environment for patent holders and that the present case should be used to remove an alleged pre-conceived anti-patent attitude.[8]

It makes much ado of statistics which supposedly show that, compared to some mythical average, the Eighth Circuit Court of Appeals is alone at one end of the range on invalidity decisions. Petitioner then uses these statistics to say that the Circuit Court is ignoring this Court's guidance. The statistics show nothing of the sort once they are examined in context.

First, it should be noted that one of the appellate judges involved in the unanimous opinion of the Circuit Court in this case was senior Circuit Judge Warren L. Jones of the Fifth Circuit. Presumably, Judge Jones was applying the obviousness test as he was aware of it in the Fifth Circuit.

In addition, if Petitioner were to give the full facts on statistics, rather than a few out-of-context quotes, the statistics actually show the Eighth Circuit to be in close alignment with the other Circuits. For instance, in its diatribe against the Circuit Court of Appeals Petitioner (P 17) quoted from page 292 of an article by Gausewitz, "Brief in Support of Proposed Amendment of Section 103, Title 35, Patents, U. S. Code," 51 J. Patent Office Soc. 290 (1969). Petitioner's purpose in quoting was to

[8] It is interesting to note that Respondent's production facility where the alleged infringement took place is in the Ninth Circuit, and that Respondent's place of residency is the Fourth Circuit. Although Petitioner could have obtained jurisdiction in either of these circuits, it deliberately selected the Eighth Circuit (where Respondent has another place of business).

support its allegation that the Eighth Circuit was out of line with all the other Circuits. If one turns to page 299 of the Gausewitz article one find the following statements:

> "If only two circuits (the Fifth and Seventh) are ignored, the percentage of patents invalidated by post-Graham appellate decisions in the remaining circuits is over 83%. Thus, if a patentee is forced to litigate in the forty-one states not within the Fifth and Seventh Circuits, his chance of having his patent validated by a court of appeals is (on the average) only about one in six. Of course, his chance of obtaining a "valid and infringed" judgment is far less.
>
> The Court of Appeals for the Eighth Circuit (Arkansas, Iowa, Minnesota, Missouri, Nebraska, and North and South Dakota) has ruled on sixteen patents during the period following Graham v. John Deere, and has invalidated all sixteen.
>
> The Court of Appeals for the Ninth Circuit (Alaska, Arizona, California, Hawaii, Idaho, Montana, Nevada, Oregon and Washington) has invalidated 91.27% of the thirty-four patents it has ruled on in the post-Graham period (thirty-one invalidated, three sustained).
>
> The Court of Appeals for the Tenth Circuit (Colorado, Kansas, New Mexico, Oklahoma, Utah and Wyoming) is another which has sustained no patents in the period since Graham."

It is obvious that the true statistics utterly fail to support Petitioner's contention that the Eighth Circuit is out of line with the other circuit courts of appeals. What one must conclude from the statistics is that the Circuit Court of Appeals, including the Eighth Circuit, are in remarkable accord in their judgments of patents. The Supreme Court, in *Graham v. John Deere*, 383 U.S. 1, set out the standard for testing patents. The courts,

both trial and appellate of the various circuits, are conforming to the standard. Petitioner has lost, not because of the hostility of the Eighth Circuit, but because it did not heed the admonition of Justice Clark, that to obtain a patent monopoly one must "build a better mousetrap." *Graham v. John Deere Co.*, 383 U.S. 1, at 17.

In its belaboring of the Eighth Circuit, Petitioner has selected from various writings (P 16, 17) only those quotations which specifically mention the Eighth Circuit. Respondent points out that a fair reading of the various articles, such as the one quoted above, shows that writers are critical of virtually all the Federal Courts, and not just the Eighth Circuit, in their judging of patents. Understandably, Petitioner ignores any writing favorable to the Federal Courts. It is refreshing to read an article by Martin R. Horn and Saul Epstein "The Federal Courts' View of Patents—A Different View" 55 J. Patent Office Soc. 134 (1973). At pages 136 and 137 appears this statement:

"In our view, the courts are not anti-patent even though admittedly from an objective point of view of a healthy patent system, far too many patents are declared invalid. It is submitted that this is caused not by the courts, but rather by the system which unfortunately encourages the issuance of questionable patents. The wonder is that the courts have been able to remain objective in their decision-making process in patent cases, rather than being jaded against patents, because so many patents that the courts see *are indeed* invalid by any reasonable standard of 'inventiveness'. By analyzing appellate holdings for the ten year period January 1, 1961 through December 31, 1970 of all Circuit Courts of Appeal and the Court of Claims, this paper will attempt to dispel the illusion of anti-patent bias, by demonstrating that the courts are applying reasonable and consistent standards of invention."

Interesting too is the Editorial Note of Milton Weissman, Editor-in-Chief of the Journal which prefaces the Horn and Epstein Article. At pages 134 and 135, Mr. Weissman takes issue with various articles critical of the courts that had recently appeared in his Journal. In speaking of the Patent Office he states (pages 134, 135):

> "* * * it is difficult indeed for anyone with an objective viewpoint to be convinced that they are paying anything more than lip service to the concept of the highest possible patent validity."
>
> "Nor are the others involved in the issuance of invalid patents to be considered entirely blameless. Do patent attorneys and their clients, the inventors, really care anything about the validity of the patents issued to them, *As long as they can obtain these patents* (which may or may not be valid)." (Emphasis supplied by Mr. Weissman).

The Eighth Circuit is in harmony with the other Circuits—as shown, it carefully uses this Court's guidelines. The use of bare statistics (even if they were correct) to determine individual rights and wrongs is nothing more than a gambling approach to the dispensation of justice. It should be noted that in the event this Court should find that the Eighth Circuit did not apply the "obviousness test", its Petitioner nevertheless still would not prevail in its action since McDonnell Douglas Corporation, as the evidence showed, and as the District Court found, did not employ the structure claimed in the patent in suit.

CONCLUSION

Petitioner's language shows it is violently annoyed at the Circuit Court for its temerity in finding the Watters Patent invalid. Petitioner in effect is urging that the only reason the Watters Patent was held invalid was because the Circuit Court is biased against inventors, and that the Circuit Court declined to follow the requirements of *Graham v. John Deere*, supra (P 6, 13).

Completely ignored is the fact that the Circuit Court had before it an abundance of extremely pertinent prior art not before the Patent Office. Completely ignored is the fact that the Court of Appeals was well aware of the level of skill in the pertinent art: (footnote 3, P 28). Completely ignored is the Circuit Court's careful adherence to this Court's guidelines in using the prior art and in considering obviousness. Completely ignored is the Circuit Court's conclusion that Petitioner lied to the Patent Office by filing a false affidavit, and that the Patent Examiner did, in fact, rely thereon.

It is submitted that there are no special and important reasons that this Court should grant this petition. The Circuit Court of Appeals for the Eighth Circuit has not rendered a decision in conflict with the decision of another Court of Appeals on the same matter. The Circuit Court has not decided a federal question in conflict with applicable decisions of this Court. The Circuit Court is not guilty of departing from the accepted and usual course of judicial proceedings, nor has it sanctioned such a departure by a lower court and, therefore, there is no call for this Court to exercise its power of supervision.

It seems clear that this run-of-the-mill patent is not the type of a patent action that should be selected by the Supreme Court to set the standard for judicial treatment of patents in the Eighth

Circuit or in any Circuit. The fact that the case has the taint of fraud is all the more reason that it should not be selected.

The petition should be denied.

Respectfully submitted,

FREDERICK M. WOODRUFF
GRAVELY, LIEDER & WOODRUFF
705 Olive Street
St. Louis, Missouri 63101
A/C 314-621-1457
Attorneys for Respondent

Of Counsel:

WALTER J. JASON
GEORGE W. FINCH
McDONNELL DOUGLAS CORPORATION
3855 Lakewood Boulevard
Long Beach, California 90846
A/C 213-593-6834